

IN THE SUPREME COURT OF MISSOURI

No. SC 86181

DONNA SNIDER, ASSESSOR FOR PEMISCOT COUNTY, et al.,

Appellants,

v.

CASINO AZTAR, et al.,

Respondents.

Appeal from the 34th Judicial Circuit Court,
Pemiscot County, Missouri

Cause No. 01CV752808

The Honorable Fred W. Copeland,
Circuit Judge

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JURISDICTIONAL STATEMENT

Respondents, Aztar Missouri Gaming Corp. and Casino Aztar, collectively “Aztar,” concur in the jurisdictional statement of Appellant, Donna Snider, Assessor of Pemiscot County, Missouri, “Assessor.” The jurisdiction of this Court to hear cases on transfer after opinion derives from Art. V, § 10 of the Missouri Constitution.

STATEMENT OF FACTS

This appeal involves the determination of the fair market value, for *ad valorem* tax purposes, of Aztar's real and tangible personal property for tax year 1999. Aztar owns a vessel and a barge, moored on the Mississippi River in Caruthersville, Missouri, in Pemiscot County, and adjacent real property which together house on and off shore facilities comprising a recreational casino gaming facility. Assessor is the public official charged with the authority to assess and levy taxes on real and personal property in Pemiscot County, Missouri.

For tax year 1999, Assessor valued Aztar's real property at \$11,970,280.00, with a corresponding assessed value as commercial property of \$3,830,490.00, LF 48, and valued Aztar's personal property, the M/V *City of Caruthersville* and the mooring barge Scott, at \$17,210,160.00, with a corresponding assessed value of \$5,763,720.00. LF 356. Aztar disputed Assessor's valuation of Aztar's real and personal property.

In two separate appeals,¹ one for real property² and one for personal property, Aztar challenged Assessor's valuations, first to the local Board, and then to the Commission. LF 14, 16, 17, 286-87.

¹ Although Assessor characterizes this action as involving three separate appeals, there are only two appeals - one for personal property for tax year 1999, and one for real property, for tax year 1999, which by statute rolls to tax year 2000 under the state's two year assessment cycle for real property.

Evidence of Value of Aztar's Real Property

Aztar's real property consists of 37.5 acres in downtown Caruthersville - 19.3 acres of which are unprotected flood ground resulting in a useable area of 18.2 acres. LF 86. The property contains a one-story building with 40,000 sq. ft. of space, referred to as the "Pavillion," which houses offices, a restaurant and bar, and retail space; two concrete gazebos with approximately 500 sq. ft.; paved parking areas; and a park. LF 86.

At the hearing before the Commission on August 12, 2000, Aztar's appraiser, Edward Dinan ("Dinan"), was the only witness, and Dinan's appraisal report and pre-filed direct testimony were the only exhibits. LF 46-47. Assessor's only evidence was her pre-filed direct testimony, which was excluded by the Commission prior to hearing. LF 44, 48-49.³ Dinan is an experienced, state certified real estate appraiser, the principal of Dinan Real Estate Advisors, a former hearing officer for the St. Louis County Board of

² To accommodate Assessor's computer system, the real property had to be divided and entered as two separate parcels, numbered 16-05-21-01-001-00100 and 16-05-21-01-001-00200. LF 14-19, 67. On appeal to the Commission, the parcels were assigned two case numbers, 99-76500 and 99-76501. The division is, however, arbitrary and the parcels have been treated as one by the parties for purposes of appraisal and assessment. LF 14-19, 67.

³ Although accepted by the Commission subject to Assessor's offer of proof, Assessor's testimony was not considered by the Commission or the circuit court. Further, Assessor did not raise the issue of exclusion at the circuit court and does not raise it here.

Equalization, LF 214-15, and has specific experience in appraising gambling and gaming real estate in Missouri. LF 73-75.

Dinan testified that he considered and developed the three methods commonly accepted by the appraisal community for valuing real estate: the cost approach, sales comparison approach, and the income capitalization approach. LF 223. The cost approach to value calculates (1) the value of the land as though it were vacant based upon recent sales of comparable land, plus (2) the cost of either replacing or reproducing the structures, depending on the type or age of the construction, (3) adjusted, as appropriate, by depreciation, obsolescence and other factors. LF 132, 140. The sales comparison approach calculates the value of the property based upon an analysis of recent sale prices of comparable property. LF 155. The income capitalization approach calculates the value of the property based upon what a prospective buyer would pay if purchasing the property for its income potential. LF 59-60.

To derive the value of the unimproved land using the cost approach, Dinan considered sales of six tracts in Missouri, two of which were purchased for use as casino property, which he determined to be comparable, and made adjustments to the price per acre of those sales where appropriate based upon size, location, and other factors to derive a value for Aztar's land of \$50.00 per acre. LF 55, 138-40. Dinan then calculated the replacement cost of the improvements, which is the cost of constructing a building with the same utility but with current design, standards, and layout. LF 140. Dinan's testimony and his appraisal report established that replacement cost is most accurate for "superadequate" or specialized construction, such as the Pavilion, which has design and

layout elements peculiar to casino properties (security system, higher than normal ceiling height, and a high percentage of “back office” space) and is not up to date with evolutions in casino construction. LF 68, 75, 140. After analyzing and depreciating the replacement cost of the improvements for physical, functional and economic obsolescence, Dinan opined that on January 1, 1999, the land and improvements together had a value under the cost approach of \$5,530,000.00. LF 144.

To derive the value of Aztar’s real property under the sales comparison approach, Dinan considered and analyzed six sales: office and retail space in Caruthersville, Springfield, and Columbia, Missouri, ranging from approximately 22,000 to 160,000 square feet and from 8 to 35 years old. LF 155-59. From these sales, Dinan made adjustments and opined that the value of Aztar’s real property under the sales comparison approach, as of January 1, 1999, was \$4,940,000.00. LF 161.

Finally, Dinan developed an income capitalization approach to value Aztar’s real property. With regard to the income capitalization approach, Dinan’s appraisal report states:

[t]he Income Capitalization Approach is a technique through which an appraiser derives a value indication for an income producing property by converting its anticipated benefits (cash flows and reversion) into property value.

...

The subject property is currently owner-occupied and was designed to meet the needs of the existing tenant. However, for purposes of this analysis, we

are estimating the economic rent that a comparable property would command in the open market as indicated by current rents that are being paid for comparable space. The subject property is somewhat unique in that it combines office, retail and storage space into one building. However, a survey of the market indicated several leases which are considered similar to the subject property.

LF 145. To derive the value of Aztar's real property under the income capitalization approach, Dinan considered six leases in Cape Girardeau and Springfield, Missouri. All were mixed use properties (office, restaurant, and retail); two of the properties were constructed in 1995 and two were extensively renovated in 1991; and three are 98% to 100% occupied. LF 146-48. Based upon these comparable income-producing properties, adjusted for advantages or disadvantages over Aztar's property, Dinan concluded that, as of January 1, 1999, Aztar's real property had an overall income capitalization value, after accounting for overhead, of \$5,000,000.00. LF 154.

On cross examination, when asked by Assessor whether he had considered the income produced by a gaming facility when applying the income capitalization approach, Dinan testified that:

what you would look for is not income derived from any business whether it would be a shoe store, a restaurant or a casino What the appraiser is viewing and is interested in comparing is only the income attributable to the real estate itself I think a good example of this would be a [sports] arena You don't take the income from ticket sales, you have to

compare that facility with other arenas that are rented by the [sports] franchises perhaps on a comparable basis.

LF 60. In addition, Dinan testified that the property's highest and best use as improved is as currently improved as a casino only because it was designed and constructed to be utilized in conjunction with a casino operation. LF 78. Dinan further explained, however, that he had to value the real property based upon sales and rentals of commercial properties, because to do otherwise would cloud the property with intangible business value, which is not taxable. LF 77-79.

When reconciling the three different approaches, Dinan noted the narrow range of the values from the development of the three approaches. LF 162, 223. He then concluded that the income capitalization approach yielded the most accurate value, and determined that the real property had a value, as of January 1, 1999, of \$5,000,000.00. LF 162.

The Commission's Decision on Aztar's Real Property

The Commission first contrasted Assessor's value "in use" theory with the appropriate Missouri standard of value "in exchange." LF 261. "The valuation of property in Missouri for *ad valorem* property taxes is based on value in exchange, not value in use." LF 261. The Commission stated that the property cannot be valued based upon the income stream of the gaming business conducted on the premises under the value standard applicable in Missouri but, rather, must be based upon what a willing buyer would pay for the property. LF 261. In addition, the appropriate value standard is not what a buyer would pay for the real property as an operating casino, because to do so

would require an impermissible transfer of the gaming license along with the property. LF 261. Thus, to evaluate the property as a saleable casino would be speculation and, further, would necessarily commingle the intangible value of the gaming license with the tangible value of the property. LF 261-62.

The Commission then evaluated Dinan's appraisal and determined that it constituted substantial and persuasive evidence of the value of Aztar's real property. LF 262. The Commission noted that Dinan properly valued the property relying on commercial land sales, commercial sales comparisons, and commercial lease data, rather than valuing the property as a casino business. LF 262. The Commission went on to find that Dinan's selection of and adjustments to the comparable vacant and improved land were proper and supported by his report. LF 263-70. For example, the Commission found, like Dinan, that it would not have been appropriate to utilize the purchase price of Aztar's land in the cost approach because the asking and sale prices were misleadingly linked to Aztar's non-transferable gaming license. LF 263.

The Commission concluded on the record before it that Aztar's evidence substantially and persuasively established the value of Aztar's real property and ordered the assessed valuation for the subject property, as determined by Assessor and sustained by the local Board, to be set aside. LF 271-72.

Evidence of Value of Aztar's Personal Property

Aztar contested Assessor's valuation of two items of Aztar's tangible personal property: the vessel housing the casino, the M/V *City of Caruthersville*

(“*Caruthersville*”) and a wharf barge, the Scott, used as of the taxing date, January 1, 1999, for passenger queuing and ticketing. LF 588.

At the Commission hearing, Aztar’s personal property appraiser, James N. Manley (“Manley”), was the only witness and Manley’s appraisal report and pre-filed direct testimony were the only exhibits. LF 354-55. Assessor’s only evidence, the same pre-filed direct testimony offered by Assessor in the real property appeal, was excluded by the Commission prior to the hearing. LF 356.⁴ Manley is an experienced marine surveyor, a principal of Manley and Manley Marine Surveyors, a member of the American Society of Marine Appraisers, past Western Rivers Director of the National Association of Marine Surveyors, LF 576-77, and in his career has appraised between twenty and thirty casino vessels. LF 393.

Manley testified that the *Caruthersville* was originally designed as an excursion boat and was converted for gaming purposes in 1995. LF 582. In addition to having only one quarter the square footage (9,740) and only half the capacity, measured by number of gaming positions (697), of any other casino vessel in service, LF 422, 583, Aztar has no expansion potential because by January 1, 1999, almost all available space on the *Caruthersville* had already been converted to hold gaming positions. LF 389. In addition to obsolescence, the general unavailability of gaming licenses also limited the number of

⁴ Although accepted by the Commission subject to Assessor’s offer of proof, Assessor’s testimony was not considered by the Commission or the circuit court. Further, Assessor did not raise the issue of exclusion at the circuit court and does not raise it here.

potential buyers. LF 378, 423. Thus, the market for used gaming boats in 1999 was saturated, with the result that gaming boats take years to sell. LF 393-94.

Manley found three comparable sales from which to determine the value of the *Caruthersville* based upon the sales comparison approach to value. The first was a boat built in 1994 at a cost of \$20,000,000.00, which held 1,028 gaming positions, and sold in July of 1999 for \$1,800,000.00; the second comparable sale was of a boat built in 1991 for \$12,000,000.00, which held 1400 gaming positions, and sold in January of 2000 for \$1,200,000.00; the third comparable sale was of a boat built in 1991 which sold in August of 1999 for \$675,000.00. LF 425-26. Based upon the price per square foot of gaming space, price per square foot of total space, and price per gaming position of these three boats, Manley concluded that the *Caruthersville* had a value of \$617,000.00 on January 1, 1999. LF 426, 428.

As a result of the market factors discussed above, Manley concluded that the cost approach to determining value would not have been accurate because this approach “would produce the illusion of high market value due to the high cost of production of a like or comparable vessel.” LF 416. In addition, Manley concluded that the income capitalization approach to determining value would not have been accurate because this approach “would inappropriately link potential income to the property (vessel) and not the gaming license which cannot be transferred or sold with the vessel itself.” LF 416.

The same factors affecting the value of the *Caruthersville* also affected the value of the Scott.⁵ The value of the Scott was further depressed by the fact that the market was flooded with single-skin tank barges of the Scott type because Coast Guard regulations require that such barges be retired by the year 2015. LF 588-90. In addition, Manley determined that no comparable sales of similarly converted, single skin tank barges had occurred in a relevant time frame. LF 368, 396, 426. He thus concluded that he could not derive a value for the Scott using the sales comparison approach. LF 426-27. In fact, larger and more elaborate support barges, more fitting with industry trends, have been offered for sale and have not sold. LF 427. Manley concluded that refitting and/or moving the Scott would be cost prohibitive. LF 590. Ultimately, Manley opined that the Scott had a fair market value of \$125,000.00 on January 1, 1999. LF 427.

The Commission's Decision on Aztar's Personal Property

The Commission considered the credibility and analysis conducted by Aztar's appraiser. LF 634. The Commission noted that Manley's valuation of the boat and barge had been based upon the data and analysis Manley was able to develop from an investigation, and on his knowledge and experience in marine vessel markets. LF 632. The Commission next determined that Manley had given due consideration to the cost and income approaches and found them unpersuasive, and had conducted an investigation

⁵ The Scott was, in fact, converted to hold gaming positions, but not as of January 1, 1999, the valuation date. Thus, its use as of the valuation date was for passenger queuing and ticketing. LF 588.

of higher quality barges and from this derived a value for the Scott. LF 637. The Commission specifically rejected Assessor's contention that book values for the boat and barge could be utilized for the cost approach because such values are not indicative of market value. LF 710. The Commission similarly rejected the use of the income approach due to lack of evidence that casino properties are routinely owned by third persons and leased as gaming entities. LF 638.

The Commission concluded that the valuation evidence for the boat and barge demonstrated that in a sale of these items, their highest and best use would no longer be as part of a casino operation, as the license to operate the casino business is not a saleable item. LF 640. In addition, the Commission noted that even a potential buyer possessing a gaming license and shopping on the open market would not likely be interested in Aztar's boat and barge because of their condition and obsolescence. LF 639. Thus, the hypothetical sale or lease for use as a casino which Assessor urged should be used as a basis for value cannot take place. LF 711-12. Further, there was no evidence of such a scenario. LF 639.

The Commission concluded on the record before it that Aztar's evidence substantially and persuasively established the fair market value of Aztar's boat and barge and ordered the assessed valuation for the subject property, as determined by Assessor and sustained by the local Board, to be set aside. LF 644.

Assessor's Appeal to the Circuit Court

The circuit court, after review of the full record, and briefing by the parties, found that the Commission's decision was supported by competent and substantial evidence,

was not arbitrary, capricious, or unreasonable, and did not involve an abuse of discretion. LF 724. The court thus upheld the Commission's decision, LF 724.

Assessor's Appeal to This Court

Assessor next appealed to this Court, claiming the Court had exclusive jurisdiction under Art. V, § 3 of the Missouri Constitution. Aztar opposed Assessor's position, and this Court agreed, transferring the appeal to the Southern District Court of Appeals. See Order granting Transfer. That court affirmed the circuit court's judgment. See Opinion, Southern District Court of Appeals. This Court thereafter granted transfer.

POINTS RELIED ON

I

THE STATE TAX COMMISSION PROPERLY SET ASIDE THE DECISION OF THE PEMISCOT COUNTY BOARD OF EQUALIZATION BECAUSE AZTAR SUBSTANTIALLY AND PERSUASIVELY ESTABLISHED THE TRUE VALUE IN MONEY OF THE SUBJECT REAL PROPERTY IN THAT THE PROPERTY WAS VALUED IN EXCHANGE AND AT ITS PROPER HIGHEST AND BEST USE.

RSMo. § 137.115

Stephen and Stephen Properties, Inc. v. State Tax Comm'n of Missouri,

499 S.W. 2d 798 (Mo. 1973)

Equitable Life Assurance Soc'y v. State Tax Comm'n of Missouri,

852 S.W.2d 376 (Mo. App. E.D. 1993)

II

THE STATE TAX COMMISSION PROPERLY SET ASIDE THE DECISION OF THE PEMISCOT COUNTY BOARD OF EQUALIZATION BECAUSE AZTAR PRESENTED SUBSTANTIAL AND PERSUASIVE EVIDENCE OF THE TRUE VALUE IN MONEY OF THE SUBJECT REAL AND PERSONAL PROPERTY IN THAT THE PROPERTY WAS PROPERLY VALUED AND THE COMMISSION'S DECISION WAS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE AS PRESENTED BY AZTAR'S EXPERT APPRAISAL WITNESSES .

Stein v. State Tax Comm'n of Missouri, 722 S.W.2d 72 (Mo. banc 1986)

Cupples Hesse Corp. v. State Tax Comm'n of Missouri,

329 S.W.2d 696 (Mo. 1959)

III

THE STATE TAX COMMISSION PROPERLY SET ASIDE THE DECISION OF THE PEMISCOT COUNTY BOARD OF EQUALIZATION BECAUSE AZTAR'S REAL PROPERTY WAS VALUED IN THE SAME MANNER AS ANY OTHER COMMERCIAL REAL PROPERTY, BASED ON ITS TRUE VALUE IN MONEY, IN THAT NO SUBCLASS WAS CREATED IN VIOLATION OF ARTICLE X, SECTION 4(B) OF THE MISSOURI CONSTITUTION.

MO. CONST. art. X, § 4(B)

RSMo. § 137.115

Stephen and Stephen Properties, Inc. v. State Tax Comm'n of Missouri,

499 S.W. 2d 798 (Mo. 1973)

Equitable Life Assurance Soc'y v. State Tax Comm'n of Missouri,

852 S.W.2d 376 (Mo. App. E.D. 1993)

STANDARD OF REVIEW

On appeal of a circuit court's review of an administrative decision, the Court reviews the decision of the agency, not the circuit court. Hermel, Inc. v. State Tax Comm'n of Missouri, 564 S.W.2d 888, 894 (Mo. banc 1978). Under RSMo. § 536.140.2, review of an administrative decision is limited to a determination of whether the agency's action was supported by competent and substantial evidence upon the whole record or whether it was arbitrary, capricious, unreasonable, unlawful, or in excess of its jurisdiction. Westwood P'Ship v. Gogarty, 103 S.W.3d 152, 161 (Mo. App. E.D. 2003); see also Missouri Baptist Children's Home v. State Tax Comm'n of Missouri, 867 S.W.2d 510, 513-14 (Mo. banc 1993). In reviewing an administrative decision, a court must consider the evidence in the light most favorable to the administrative agency, along with all reasonable inferences therefrom, and if the evidence would support either of two opposed findings, the court is bound by the administrative determination. Westwood P'Ship, 103 S.W.3d at 161. "The Commission is the judge of the credibility of the witnesses and the evidence." Nance v. State Tax Comm'n of Missouri, 18 S.W.3d 611, 615 (Mo. App. W.D. 2000). The "proper methods of valuation and assessment of property are delegated to the Commission." Savage v. State Tax Comm'n of Missouri, 722 S.W.2d 72, 75 (Mo. banc 1986).

ARGUMENT

Responding to the Argument set forth under Assessor's Point Relied On No. I

I. THE STATE TAX COMMISSION PROPERLY SET ASIDE THE DECISION OF THE PEMISCOT COUNTY BOARD OF EQUALIZATION BECAUSE AZTAR SUBSTANTIALLY AND PERSUASIVELY ESTABLISHED THE TRUE VALUE IN MONEY OF THE SUBJECT REAL PROPERTY IN THAT THE PROPERTY WAS VALUED IN EXCHANGE AND AT ITS PROPER HIGHEST AND BEST USE.

The crux of Assessor's argument is that Aztar's real property – its land and improvements – had to have been valued based upon what a willing buyer would pay a willing seller for an operating casino rather than based upon what a willing buyer would pay a willing seller for the land and improvements. The fundamental flaw in this argument is that Assessor is advancing an impermissible value in use standard rather than Missouri's established value in exchange standard. Assessor's argument regarding the highest and best use analysis is nothing but a cover to advocate the non-conforming standard. Our Southern District Court of Appeals recognized this, as should this Court.

Missouri law requires that real property be assessed for tax purposes based on its true value in money. RSMo. §137.115. "True value in money is the price which the property would bring from a willing buyer when offered for sale by a willing seller." Missouri Baptist Children's Home, 867 S.W.2d at 512. "True value in money is defined in terms of value in exchange and not in terms of value in use." Equitable Life Assurance Soc'y v. State Tax Comm'n of Missouri, 852 S.W.2d at 376, 380 (Mo. App. E.D. 1993) (citing Stephen and Stephen Properties, 499 S.W.2d at 801-03). True value in money is

the equivalent of fair market value. O’Flaherty v. State Tax Comm’n of Missouri, 698 S.W.2d 2, 3 (Mo. banc 1985).

In Equitable Life Assurance Soc’y, a high-end hotel and the tax assessor both appealed the Commission’s determination of the hotel’s real property tax assessment. 852 S.W.2d at 378. All parties agreed that the highest and best use of the property was as improved for hotel use. Id. The assessor sought to overturn the Commission’s calculation of the hotel’s gross annual income under the income capitalization method on the basis that the Commission’s calculation went against the weight of the evidence. Id. at 380. The court rejected the assessor’s argument on the basis of a two-step analysis. Id. at 380, et seq. First, the court held that a large portion of the hotel’s gross receipts were attributable to business acumen: the hiring of an expert manager, the name and reputation of the hotel chain, access to the chain’s reservations network, etc. Id. at 380-81. Second, the court held that to consider revenues generated by business acumen in the price that the hotel might bring as an income-generating property would be a misapplication of the standard. Id. at 381. The court stated:

[A]lthough the property at issue happens to be a Marriott hotel, what is at issue for tax assessment purposes is not the value of the Marriott hotel; it is the value of the real property which is being used to operate a Marriott hotel. Therefore, the value of the Marriott franchise and business acumen must be excluded if one is to value the property by the income capitalization method. These elements are not part of the “real property” as defined above and, to the extent that these elements influence the income

presently being derived from the hotel, that income is not part of the income stream that could reasonably be anticipated by a willing buyer of the land and improvements only.

Id.

In this case, there was no dispute that the highest and best use of the real property is as currently improved as a casino. Importantly, though, this use is dependent on the gaming license. LF 51, 63, 65, 79, 129. However, Aztar's expert witness also opined that a retail commercial development is an alternative highest and best use. LF 63, 79. This also was not disputed. This important evidence was also highlighted by the Court of Appeals, which emphasized Aztar's expert's testimony that "the higher value between the highest and best use as a casino and the alternate as a commercial retail facility 'would be some other type of commercial endeavor[,] rather than a casino.'" Opinion, pg. 8. Aztar's expert, and the Commission, agreed that, without the gaming license, there would be no market for the property as a casino, and the property would have a highest and best use as some type of other commercial entity. LF 261-62. This critical evidence was also highlighted by the Court of Appeals. Opinion, pg. 9.

Assessor claims that the Commission crafted a new rule for the valuation of casinos - that casinos be valued not at their highest and best use but at the next most profitable commercial activity. Assessor's Substitute Brief, pg. 27.⁶ Indeed, Assessor's

⁶ Assessor states that the adoption of such a rule would result in undervaluing casinos. As the Commission did not adopt any rule for valuing casinos, it is not useful to speculate

claim that valuing the property other than as an operating casino undervalues (and even more precisely with respect to casino properties, grossly undervalues) the property, Assessors Substitute Brief, pg. 26, stands unsupported in the evidence, and without citation to any authority. Moreover, Assessor's argument plainly misconstrues the legal standard and the evidence the Commission relied upon in reaching its decision.

The Commission did not, as claimed by Assessor, adopt a policy for valuing casino properties. Consistent with the standard of Equitable Life Assurance Soc'y, which held that the hotel's income attributable to its being a well-managed, high-end hotel must be segregated from the hotel's income capitalization value as an investment property, 852 S.W.2d at 381, Aztar's appraiser segregated the casino's income attributable to its gaming license from its income capitalization value as an investment property. The Commission recognized the proper standard, stating "[t]he subject property cannot be valued in use as a casino, no more than a property improved by a McDonald's restaurant can be valued based upon the income it produces as a McDonald's franchise." LF 261.

as to the result of such a rule. Further, Assessor's citation to the court's observation in City of Atlantic City v. Boardwalk Regency Corp., 19 N.J. Tax 164, 179 (Super. Ct. N.J. App. Div. 2000) that values of properties not zoned for casino use are lower than the values of properties zoned for casino use is inapposite. Valuing casinos at their next most profitable commercial use is not analogous to comparing values of properties zoned for different uses.

The Commission understood that Aztar's appraiser had properly applied the standard, stating:

The appraiser properly viewed the property as it was improved but recognized the critical factor that his task was not to appraise a gaming facility . . . [I]mplicit in [the] appraisal is the assumption that the subject property will not command a purchase price as improved as high as would be expected if it were to sell for a casino. This is a proper assumption for valuing property in exchange - the appropriate standard.

LF 262.

Assessor also argues that Aztar's appraiser should have relied exclusively on sales of casino land in calculating the value of Aztar's land for the cost approach and that the failure to do so resulted in the land being valued at less than its highest and best use. Here, as with the income capitalization approach, Assessor's standard would add intangible, non-taxable, value to Aztar's land based not upon the value of the land but upon Aztar's possession of a gaming license that is not saleable. This is not the proper standard of value under Missouri law, and the Commission recognized as much when it refused to consider the price Aztar allegedly paid for the land in question because "[t]he casino license was clearly a critical factor relating to the purchase of the subject land and the price paid for same." LF 264.

It is implicit in Assessor's argument - that Aztar's appraiser undervalued Aztar's land because the appraiser refused to rely exclusively on sales of land for casino purchases - that the sale price of land for casino purposes would be higher than the sale

price for land not suitable or improved for casino use. Yet, it is telling that Assessor does not argue that casino land is worth more because of high visibility (the appraiser's comparable land sale #2 notes high traffic and proximity to a Wal-Mart), or highway access (#2, 4 and 5 note accessibility), or development costs (#1-4 note grading, seepage and access to utilities). LF 134-36. Rather, the only characteristic of casino land which would support the added value inherent in Assessor's argument is the possession by the purchaser of a casino license and concomitant ability to put the land to use as a casino.

At its most fundamental level, Assessor's argument fails to recognize established Missouri law governing the valuation of property for *ad valorem* tax purposes. Fair market value for tax assessment purposes mandates that a taxpayer's real property be taxed based on the value of the land and improvements themselves, not income generated from the business conducted on the property, nor the value the taxpayer adds to the property by good will or possession of a gaming license, or any other intangible element of value. Equitable Life Assurance Soc'y, 852 S.W.2d at 380-81. Instead, Assessor claims that land fronting on a river should be more valuable, not because it fronts on a river, but because *Aztar* can utilize it to dock a casino. Similarly, Assessor believes that the buildings which cost more to build because they are superadequate should also be worth more because their superadequacy makes them suitable for use by *Aztar* in conjunction with a casino. Importantly, Assessor fails to recognize that *Aztar*'s possession of a casino license is the single factor which accounts for the inflated sale price of the land and the more costly buildings. Consequently, to value the added costs of the land and the buildings for tax purposes would be to tax the value in use to *Aztar*, not

the *market* value, or value in exchange, which is the proper standard of valuation under Missouri law. Equitable Life Assurance Soc’y, 852 S.W.2d at 380-381.

As the court did in Equitable Life Assurance Soc’y, this Court should reject Assessor’s in use valuation for the property because the value at issue is not the value of an operating casino business, but the value of the real property which is being used to operate the casino. LF 261.

Significantly, Assessor cites no authority supporting her application of the highest and best use concept, i.e. value in use, in the context of assessment of real property for tax purposes under Missouri law. Instead, Assessor relies on a condemnation case, City of St. Louis v. Union Quarry & Constr. Co., 394 S.W.2d 300 (Mo. 1965), and a Delaware case decided under Delaware law, Delaware Racing Ass’n v. McMahon, 340 A.2d 837 (Del. 1975), which Assessor describe as “indistinguishable” from this case. Assessor’s Substitute Brief, pg. 29.

Union Quarry is readily distinguishable and provides no support for Assessor’s position. In fact, in this almost 40 year old decision, this Court specifically highlights that in determining fair market value, “each case must be considered in the light of its own facts, not on the basis of some artificial rule, but of sound judgment and discretion on a consideration of all relevant circumstances.” 394 S.W.2d at 305. The Court pointed out that the circumstances in Union Quarry are “unique and different.” “This property is a special situation.” 394 S.W.2d at 305. The Court went on to point out that many of the factors ordinarily considered in determining market value of real estate are non-existent or inapplicable to the land at issue in Union Quarry. In particular, the land at issue had

been converted from an abandoned quarry, a hole in the ground, to a temporary landfill. In this particular circumstance, this Court found that because the landfill business was inextricably related to and connected with the land where it was located, such that an appropriation of the land would mean an appropriation of the business, that fact was relevant in determining “just compensation” under the condemnation law.

Significantly, however, this Court was careful to point out that its decision was an exception to the general rule that business value is “too speculative, uncertain, and remote to be considered as a basis for computing or ascertaining the market value.” 394 S.W.2d at 306. The Court also specifically pronounced:

This announcement is not in derogation or repudiation of the general rule that business profits are ordinarily not admissible evidence of the value of the land on which the business is located. We adhere to that rule, as announced in this state many times.

394 S.W.2d at 305.

Aztar’s real property case is not a “special situation.” The casino business is not inextricably connected to the land, nor would a purchase of the land mean a purchase of the casino business. Indeed, that could not happen because the license is not saleable, the critical fact highlighted by the Commission in its decision.

Union Quarry, therefore, as a condemnation case, and not a real property tax case, does not impact the valuation standard of true value in money pursuant to RSMo. § 137.115, nor does it stand for the proposition that Aztar’s real property should have been valued in use, as advanced by Assessor.

Similarly, Assessor's reliance on an almost 30 year old Delaware case is misplaced. Assessor even misrepresents the result reached in Delaware Racing Ass'n, as the Delaware Court reversed the decision of the lower court which found in favor of the taxing authority. The case was remanded to the local board of assessment review with an instruction to conduct a new hearing on all issues. 340 A.2d at 844.

The only significant statement by the Delaware Supreme Court is its agreement with the decision of the lower court on the legal principle that, in determining true value in money under Delaware law, real property should be valued for tax purposes at the highest and best use for which the property is reasonably adaptable and available. Under relevant Missouri law, Aztar does not dispute this principle. However, what is most important about Delaware Racing Ass'n is its affirmation of the principle that value in use is not an appropriate standard for valuing property:

Where, however, the profits stem, not from the use of the land, i.e. rent, but from the successful operation of a business which happens to be situate [sic] on that land, the capitalization of business income is not generally appropriate.

340 A.2d at 842 [citations omitted].

This is the critical issue that Assessor misses in this case. Assessor either confuses, misconstrues, or mischaracterizes the concept of highest and best use, an appraisal concept, with the proper standard of valuation under Missouri law - true value in money, defined as value in exchange.

Assessor's further argument that the Commission "fails to see" . . . "that it is not the gaming license which gives the property its highest and best use . . . [i]t is the demand

for a gaming facility in the community and the physical attributes of the property which allow it to be developed to such a use . . .” that should have been considered, is seriously flawed. It is without question that the demand for or the benefit a real estate development produces for a community is *not* considered in the appraiser’s analysis of highest and best use. Highest and best use is driven by economic considerations and market forces, not by public interest. This is a fundamental appraisal concept highlighted by the leading text on real property appraisal. See The Appraisal of Real Estate, 11th Ed., Appraisal Institute, p.298.

The Commission also did not misconstrue or improperly apply the concept of value in use, as claimed by Assessor. Assessor’s Substitute Brief, pg. 32. Value in use is properly defined as “The value a specific property has to a specific person or specific firm as opposed to the value to persons or the market in general.” The Dictionary of Real Estate Appraisal, 4th Ed., Appraisal Institute, p. 306. This is precisely the construction the Commission placed on the concept of value in use. The Commission properly dismissed this standard of valuation as the applicable standard and instead applied the appropriate standard under Missouri law - value in exchange.

Assessor next directs the Court to McGraw-Edison Co. v. Washington County Bd. of Assessment Appeals, 573 A.2d 248 (Pa. Commw. Ct. 1990) as “instructive.” Assessor’s Substitute Brief, pg. 33. McGraw-Edison, in its application of Pennsylvania law, is helpful only in its affirmance of the definition of value in use - a method of value “based upon the value of the property to the current owner” - which the court affirmed is

improper “because such a method may well result in a value higher than that available in the marketplace.” Id. at 251.

It is worth repeating that Assessor presented no evidence of value to the Commission. LF 261, 632-33. Conversely, Aztar presented a valuation supported by substantial and persuasive evidence. Like the appraiser in McGraw-Edison, Aztar’s appraiser analyzed comparable sales as part of his valuation of Aztar’s property. LF 155-59. Further, like the appraiser in McGraw-Edison, Aztar’s appraiser considered the highest and best use of the property. LF 78. The Commission fully and properly analyzed the only evidence presented to it - Aztar’s - and applied the proper value standard to the evidence in valuing the property.

Nowhere in her Substitute Brief does Assessor even address the proper Missouri valuation standard. The arguments advanced by Assessor are classic arguments for value in use, and should be wholly rejected. Thus, Assessor’s “highest and best use” argument should be rejected as contrary to the value in exchange standard used to value real property for tax assessment purposes under Missouri law.

Responding to the Argument set forth under Assessor's Point Relied On No. II and Point Relied On No. III

II. THE STATE TAX COMMISSION PROPERLY SET ASIDE THE DECISION OF THE PEMISCOT COUNTY BOARD OF EQUALIZATION BECAUSE AZTAR PRESENTED SUBSTANTIAL AND PERSUASIVE EVIDENCE OF THE TRUE VALUE IN MONEY OF THE SUBJECT REAL AND PERSONAL PROPERTY IN THAT THE PROPERTY WAS PROPERLY VALUED AND THE COMMISSION'S DECISION WAS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE AS PRESENTED BY AZTAR'S EXPERT APPRAISAL WITNESSES.

This case involves property tax assessment, and a challenge to the Commission's expertise in property tax assessment. This Court has acknowledged "the wisdom of the General Assembly in providing an administrative agency to deal with this specialized field." Savage v. State Tax Comm'n of Missouri, 722 S.W.2d at 72. The evidence must be considered in a light most favorable to the Commission, together with all reasonable inferences which support it. Id.

Accordingly, this Court is not permitted to substitute its discretion for the discretion legally vested in the Commission and "should not set aside its findings unless such are 'unsupported by competent evidence and substantial evidence upon the whole record;' or are 'for any other reason, unauthorized by law;' or are 'arbitrary, capricious or unreasonable;' or that they involve 'an abuse of discretion.'" Stein v. State Tax Comm'n of Missouri, 379 S.W.2d 495, 498 (Mo. 1964). By its arguments, however, Assessor

would have this Court substitute its discretion for the discretion legally vested in the Commission.

Assessor's primary argument is that the methods employed by Aztar's expert appraisal witnesses to value the subject property, which the Commission found substantial and persuasive, did not constitute substantial evidence of the value of the subject property.

The Commission, however, is not bound by any single formula, rule, or method in determining true value in money, but is free to consider all pertinent facts and estimates and give them such weight as reasonably they may be deemed entitled. St. Joe Minerals Corp. v. State Tax Comm'n of Missouri, 854 S.W.2d 526, 529 (Mo. App. E.D. 1993). The relative weight to be accorded any relevant factor in a particular case is for the Commission to decide. St. Louis County v. Security Bonhomme, Inc., 558 S.W.2d 655, 659 (Mo. banc 1977); St. Louis County v. State Tax Comm'n of Missouri, 515 S.W.2d 446, 450 (Mo. 1974); Chicago, Burlington & Quincy R.R. Co. v. State Tax Comm'n of Missouri, 436 S.W.2d 650, 657 (Mo. 1968).

True value in money is never an absolute figure. Cupples Hesse Corp. v. State Tax Comm'n of Missouri, 329 S.W.2d 696, 700 (Mo. 1959). True value in money is merely an estimate of the fair market value on the valuation date. Hermel, 564 S.W.2d at 897. There are various methods that may properly be considered for estimating true value in money, including comparable sales, cost, and income capitalization. St. Joe Minerals, 854 S.W.2d at 529. The Commission is not required to adopt any particular valuation technique. Id. "Methods of valuation and assessment of property are matters

delegated to the expertise of the administrative agencies of the legislature.” C&D Inv. Co. v. Bestor, 624 S.W.2d 835, 838 (Mo. banc 1981). The Commission is such an agency, and courts are loathe to substantiate their judgment for the expertise of the Commission in matters of property tax assessment. Equitable Life Assurance Soc’y, 852 S.W.2d at 379.

Although there is a presumption of validity, good faith, and correctness of assessment by the County Board of Equalization, Hermel, 564 S.W.2d at 895, the presumption is overcome by the taxpayer presenting an opinion of value supported by substantial evidence. Cupples Hesse, 329 S.W.2d at 702. Substantial evidence can be defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id. The persuasiveness of evidence does not depend on the quantity or amount thereof but on its effect in inducing belief. Brooks v. General Motors Assembly Div., 527 S.W.2d 50, 53 (Mo. App. 1975). Here, the Commission properly found that Aztar presented substantial and persuasive evidence of the true value in money of the subject real and personal property. LF 258, 701.

A. Real Property

Assessor presented no evidence of value for Aztar's real property.⁷ Assessor is therefore left only with claims that the Commission's decision is unsupported by competent and substantial evidence on the whole record, a high burden.

Aztar's real property appraiser, Edward Dinan, is an experienced, qualified appraiser, LF 214-15, and has specific experience in appraising gambling and gaming real estate in Missouri. LF 73-75. He testified that he considered and used three methods for valuing Aztar's real property: the cost approach, sales comparison approach, and the income capitalization approach. LF 223. These are three approaches commonly accepted, and approved by our courts, for valuing real property for tax purposes. Quincy Soybean Co. v. Lowe, 773 S.W.2d 503, 504 (Mo. App. E.D. 1989).

To derive the value of the unimproved real property using the cost approach, Dinan considered sales of six casino and non-casino land parcels that he determined to be comparable, and made adjustments to those sales where appropriate based upon size, location, and other factors. LF 55, 138-40. Next, Dinan calculated the cost of the improvements to Aztar's property. He elected to use the "replacement cost less depreciation method," as opposed to an alternative method called the "reproduction cost method," and utilized the Marshall-Swift Cost Manual to calculate replacement cost for

⁷ Assessor's only evidence, the pre-filed written direct testimony of Donna Snider, was excluded by the Commission, and Assessor has never raised the issue of the exclusion of Exhibit 1 in any lower court, or in this Court.

the improvements. LF 68, 140. Dinan used the replacement cost less depreciation method because he believed this approach is more accurate for valuing property with superadequate or special use design elements, such as Aztar's property. LF 68, 75, 118, 140. Dinan then analyzed various factors to account for physical, functional and economic obsolescence, and depreciated the improvements' replacement cost. LF 143-144. Dinan opined that as of January 1, 1999, Aztar's unimproved land, together with improvements, had a value of \$5,530,000.00 under the cost approach. LF 144. The Assessor did not present any evidence to rebut this conclusion.

Assessor now argues that Dinan erred in using the replacement cost method, claiming that Dinan should have used the reproduction cost method instead. Assessor's Substitute Brief, pg. 39-40. The reproduction cost method values improvements based upon the cost to build an exact reproduction of the subject property, LF 68, and Assessor argues that this method is more accurate for recent construction. Assessor's Substitute Brief, pg. 39. Dinan's testimony and report reflects that he considered the reproduction cost method, LF 68-69, 140, but that he felt the replacement cost method better accounted for the subject property's functional obsolescence and superadequate or special use design elements that are required for casino use but worthless to others. LF 68-69, 118, 142.

Dinan is not alone in preferring the replacement cost method under the cost approach for superadequate property. See Stephen and Stephen Properties, 499 S.W.2d at 803 ("While it is proper to give due weight to the element of cost in fixing the value, that should not control against proof showing a less value. It is well known that a

building, especially one constructed for a special purpose, is rarely worth on the market what it has cost to erect it.”); Aspenhof Corp. v. State Tax Comm’n of Missouri, 789 S.W.2d 867, 869 (Mo. App. E.D. 1990) (“The method used by the Commission in this case was the widely accepted replacement cost less depreciation method.”).

Dinan noted that he gave minimal weight to the cost approach in his final analysis of value for the subject property because he considered the property to be an overimprovement for the market, as buildings similar to the subject property are not typically bought and sold based on their depreciated replacement cost value. LF 162.

To derive the value of Aztar’s real property under the sales comparison approach, LF 155, Dinan considered six sales of office and retail buildings in Caruthersville, Springfield, and Columbia, Missouri, LF 155-58, and from these comparable sales concluded that the value of Aztar’s real property, as of January 1, 1999, was \$4,940,000.00. LF 161. Dinan had no sales of comparable land-based casino facilities on which to rely in his application of the sales comparison approach. LF 75-79. Dinan also testified that the subject facility is out of touch with current development concepts in what has become a very competitive business, LF 75-76, 78-79, 155, and would be more valuable if put to alternative commercial uses, such as retail, mall or office space. LF 62-65, 77-79. Accordingly, Dinan analyzed the sales of these types of property, adjusted some sales up to account for the improving market for commercial real estate, added value for the additional land owned by Aztar, and made adjustments for age and location of the comparable properties. LF 160. Assessor did not present any evidence to rebut Dinan’s conclusion under the sales comparison approach.

Dinan concluded that although the comparable properties he found were considered useful in the sales comparison approach analysis, the approach was somewhat limited due to the inability to make direct comparisons. LF 162. He also determined, however, that the value indicated by the sales comparison approach “strongly supports the Income Capitalization Approach.” LF 162.

Dinan relied most heavily upon the income capitalization approach in valuing Aztar’s real property. LF 162.

The income capitalization method of valuing real property is ... based on an evaluation of what a willing buyer would pay to realize the income stream that could be obtained from the property when devoted to its highest and best use Under this method, the Commission must project the net income stream that could reasonably be anticipated by an investor/purchaser, discounting future dollars to present levels in order to compensate for risk and the elapsed time required to recapture the initial investment.

Equitable Life Assurance Soc’y, 852 S.W.2d at 380.

To derive a value for Aztar’s property under the income capitalization approach, Dinan examined the casino facilities in the market to determine whether facilities are rented for casino use, but found that all casino facilities in this market are owner-occupied. LF 61, 73. Dinan determined that Aztar’s property combines office, retail, and storage space. LF 221. Dinan then found income generating properties with similar characteristics, LF 150, and analyzed the relevant factors. LF 145-50. From the income

generated by these comparable properties, Dinan calculated the value of Aztar's real property as investment property using the income capitalization approach. He therefore concluded that the value of Aztar's real property, as of January 1, 1999, was \$5,000,000.00. LF 154. Assessor did not present any evidence to rebut Dinan's conclusion.

The Commission adopted Dinan's valuation of the real property under the income capitalization approach. LF 267. The Commission found that Dinan had been correct to disregard the income generated by the casino "for to do so would be to value the business and not the income stream which would be produced from the lease of the subject property." LF 267, 268. The Commission also found that Dinan appropriately considered the income the property could generate if rented for retail purposes since, in the appraiser's uncontested opinion, that is the use to which the property would most likely be put by an investor not in possession of a casino license. LF 268.

The Commission specifically found that the comparable rental properties utilized by Dinan "were appropriate for arriving at the data necessary to conduct a proper income approach." LF 268. "There is no data to establish a rental rate and rental expenses to develop a stream of income for the lease of a facility such as the subject for use as a casino. Therefore, the appraiser did not err in not employing information which does not exist and cannot be developed from the market." LF 268.

The Commission properly concluded that "if, in fact, properties housing the land based support facilities for casino's [sic] were bought and sold for further use as a casino, then it would have been appropriate to consider such sales. Clearly, there are no [sic]

because the license cannot be bought and sold.” The Commission thus held that “since the property cannot be bought and sold as a casino, it would be bought and sold for an alternate economic use.” LF 269-70.

In Hermel, this Court held that it is within the administrative discretion of the Commission to judge the factors which should be considered in fixing the "true value in money" under the income capitalization approach. 564 S.W.2d at 896. The Court specifically stated that “[i]t is not within the purview of this court to ascertain the correct or modern means of determining the value according to the income capitalization approach just as it is not within the purview of this court to determine the method of valuation to be adopted by the commission.” Id.

Assessor now repeats her argument that the Commission erred in not considering the functionality of the property for use as a casino in the value the property. Assessor’s Substitute Brief, pg. 41-42. However, in addition to the invalidity of this argument under Missouri’s value in exchange standard, Assessor’s argument simply fails to recognize the wide range of the Commission’s discretion. “The Commission has wide latitude in determining whether there is sufficient similarity in pertinent comparison factors for the sales prices of other lands to be of assistance in determining value.” Abeln v. State Tax Comm’n of Missouri, 793 S.W.2d 490, 491 (Mo. App. E.D. 1990). Here, the Commission considered the lack of any casino rental comparisons and found Dinan’s comparable rentals to be valid based upon Dinan’s uncontested opinion of the likely uses for the property as investment property. LF 267-68.

When reconciling the three different approaches, Dinan noted the narrow range of the values from the three approaches, which lend confidence to the value estimates. LF 162. He then concluded that the real property's fair market value, as of January 1, 1999, was \$5,000,000.00. LF 162. The Commission found that Dinan's methodology was appropriate, and substantially and persuasively established the fair market value of Aztar's real property. LF 270.

The determination of the method of appraisal most suited to valuing a particular property is within the discretion of the Commission and not subject to review by this Court. Hermel, 564 S.W.2d at 896. The Commission's decision on the value of Aztar's real property should, therefore, be affirmed.

B. Personal Property

Similar to the real property appeal, Assessor presented no evidence of value for Aztar's personal property, and is therefore left only with claims that the Commission's decision is unsupported by competent and substantial evidence on the whole record.

The only personal property at issue, Aztar's casino vessel, the M/V *City of Caruthersville*, and the passenger queuing and ticketing barge, the Scott, were valued pursuant to generally accepted appraisal techniques by James N. Manley. Manley is an experienced and qualified marine surveyor. LF 576-77. He has appraised between twenty and thirty casino boats in his career. LF 393.

Manley considered three generally recognized approaches, the cost approach, sales comparison approach, and the income capitalization approach, in valuing the *Caruthersville* and the Scott. See Quincy Soybean, 773 S.W.2d at 504.

1. The Caruthersville

Manley established that the condition of the *Caruthersville*, including the vessel's size, and the state of the market for used casino vessels, are all factors that affect the marketability of the *Caruthersville*. LF 583. The Commission, in adopting Manley's valuation of the *Caruthersville*, held that these are proper factors to consider in the valuation. LF 706; see Hermel, 564 S.W.2d at 896 (holding that it is within the administrative discretion of the commission to judge the factors which should be considered in fixing the "true value in money").

Manley relied primarily upon the sales comparison approach to value the *Caruthersville* because this approach accounts for the views and reactions of owner-users in the marketplace and the market's acceptance or rejection of various features and trends. LF 379, 427, 586.

In light of the factors that affect marketability, Manley also considered, and rejected, the cost approach because, despite the high cost of production of a like or similar vessel, LF 416, the market for used casino boats is flooded and the small size of the *Caruthersville* is inconsistent with the industry trends - and the trend of state authorities in awarding casino licenses - to favor larger boats with room for more gaming positions. LF 584. Thus, Manley did not consider the cost approach to be reflective of market value because the *Caruthersville* is functionally obsolete. See Stephen and Stephen Properties, 499 S.W.2d at 803 (property built for a special purpose is rarely worth on the market what it cost to build).

Manley also considered but rejected the income approach because this approach would inappropriately link the casino revenue, which is a product of the gaming license, to the boat itself. LF 416, 392. The Commission agreed that to link the casino revenue to the value of the boat (and barge) would have been inappropriate. LF 710. The Commission also noted that there was no evidence suggesting that casino boats and barges are rented to casino operators, and any attempt to calculate the income stream the boat and barge might generate as investment property would be speculation. LF 710. The Commission thus held that Manley had given due consideration to the cost and income approaches in valuing the *Caruthersville* and the Scott and had not erred in rejecting these approaches. LF 709. See Hermel, 564 S.W.2d at 896 (holding that the determination of the method of appraisal most suited to valuing a particular property is within the discretion of the Commission and not subject to review by this Court).

In deriving value under the sales comparison approach, Manley selected three sales of comparable casino boats from which to determine the value of the *Caruthersville*. LF 424-46. In analyzing these comparable sales, Manley measured the size of the boats based upon the number of gaming positions, the square footage used for gaming positions and the total square footage of gaming and non-gaming space. LF 379. Manley testified that all three measurements must be considered for the sales comparison approach because a boat's potential for modification to add or remove gaming positions and spaces are factors in the boat's market value. LF 380. Manley also rejected several sales proposed by Assessor because these were of new vessels or occurred during a time when market conditions were significantly different. LF 384-85. The Commission agreed that

the sales Manley used in valuing the *Caruthersville* under the sales comparison approach were sufficiently comparable to yield an accurate valuation. LF 706. See Abeln, 793 S.W.2d at 491 (Commission has discretion in determining whether there is sufficient similarity in comparison factors for the sales prices to be of assistance).

Assessor claims this case is directly controlled by Quincy Soybean, a case in which the Commission did not adopt the valuation method of the taxpayer's appraiser, but instead adopted the valuation method of the assessor. Quincy Soybean does not help Assessor's position. The critical difference is that, in Quincy Soybean, the Commission did *not* adopt the taxpayer's expert's method of valuation. The Commission's order, which adopted the method of valuation employed by the assessor, was affirmed by the court of appeals because it was supported by competent and substantial evidence. Quincy Soybean, 773 S.W.2d at 505. Here, however, the Commission did approve the method of valuation employed by Manley in his valuation of the *Caruthersville*. LF 706, 710-11, 715-16.

Specifically, the Commission found that Manley's use of sales of three other gaming vessels were all sufficiently comparable to the *Caruthersville*. LF 706. Significantly, the comparable sales "demonstrated that boats such as the *Caruthersville* have decreased in value from the height of the gaming boat boom. The range of decline was from an initial sale value in the early and mid-1990s of \$17,000,000 to \$20,000,000 down to a resale value in 1999 and 2000 of \$1.2 million to \$1.8 million. The third sale indicated a value of only \$675,000 for a boat comparable to the subject." LF 706.

Manley thus concluded, and the Commission agreed, that the fair market value of the *Caruthersville*, as of January 1, 1999, was \$617,740.70. LF 592, 716. Quincy Soybean thus affirms the longstanding principle that methods of valuation and assessment of property are matters delegated to the expertise of the Commission. 773 S.W.2d at 505. The Commission's affirmance of Manley's method of valuation is fully supported by competent and substantial evidence and should, therefore, be affirmed.

2. The Scott

As of the relevant valuation date, January 1, 1999, Aztar only used the wharf barge Scott as a passenger boarding and ticketing barge. LF 588. Manley has appraised approximately thirty casino support barges like the Scott. LF 426. Manley opined that the Scott would have "scant appeal in the used gaming vessel market on January 1, 1999." LF 426. Significantly, Manley established that the Scott was "designed and equipped to operate in a small market area . . . [r]enovation or major alteration to permit the vessel to be moved, and operate effectively in another market would be prohibitive." LF 427.

Manley considered two scenarios involving other passenger ticketing barges in his analysis of the value of the Scott. In 1999, Argosy Casino offered their support barge for sale and were unable to find a buyer. Argosy eventually agreed to sell the barge to Jefferson Barracks Marine Service for \$1.00. The sale was not consummated and the barge later sank and was scrapped. LF 427.

Argosy also marketed another casino support barge during 1998, but no offers materialized. LF 427. The Commission agreed with Manley's analysis of the value of

the Scott, finding that the Scott is not designed and equipped to operate in a larger gaming market, and that the major alterations required to make the barge efficient for operation in such a market would be prohibitive. LF 706. Specifically, the Commission found that “[t]he evidence establishes that there is not any other reasonable market for the barge. The appraiser had determined that tank barges of this type are readily available at prices below \$100,000 from a variety of sources. The availability of barges with comparable or better hulls in the market make the subject barge less desirable.” LF 706.

Similar to his valuation of the *Caruthersville*, Manley also considered but rejected the cost approach in valuing the Scott. LF 372, 416. The cost approach is unreliable because the Scott is too small and too old, and because industry prefers to custom-build a fresh concept rather than convert a used piece of equipment with an old design. LF 373, 396, 426.

In addition, Manley also considered but rejected the income capitalization approach as not reflective of market value because this approach would inappropriately link the casino revenue, which is a product of the gaming license, to the vessel itself. LF 416, 392.

Manley ultimately concluded that the fair market value of the Scott, as of January 1, 1999, was \$125,000. LF 426-27. This was affirmed by the Commission. LF 716.

Assessor’s further claim that the Commission’s opinion is “flawed” simply because Manley did not value the *Caruthersville* or the Scott under the cost approach or the income capitalization approach, is severely misplaced. There is no requirement that

an appraiser use or rely on all three valuation approaches, only that the approaches be considered. The record clearly establishes that Manley considered all three valuation approaches. LF 709.

The Commission specifically held that “failure to use an income approach in valuing the boat and barge was neither an error nor inappropriate on the part of Complainant’s appraiser...[t]here is nothing in this record to establish that boats or barges, like either of the two being valued in this appeal, are routinely leased to produce a stream of income. There is nothing to establish that boats and barges generally utilized in riverboat casino operations are owned by an entity other than a casino and then leased to the casino.” LF 710. Significantly, the Commission specifically found that “any attempt to value the boat or barge in this appeal based on the income stream of the casino is completely outside of any recognized appraisal practice for valuation of the personal property.” LF 710.

In adopting Manley’s valuation of the Scott, the Commission noted that (1) an appraiser is not required to utilize approaches that cannot be developed and supported by data, LF 709 and (2) that the Commission itself is not bound by a single method but is free to consider the pertinent facts and estimates. LF 703 (citing Security Bonhomme, 558 S.W.2d at 659; St. Louis County v. State Tax Comm’n of Missouri, 515 S.W.2d at 450; Chicago, Burlington & Quincy R.R. Co., 436 S.W.2d at 657).

The Commission found that the evidentiary record, as presented by Aztar, was sufficient to establish the value of the *Caruthersville* and the Scott. LF 715. This Court is not permitted to substitute its judgment for the expertise of the Commission. Equitable

Life Assurance, 852 S.W.2d at 379. The evidence must be considered in a light most favorable to the Commission, together with all reasonable inferences which support it. Hermel, 564 S.W.2d at 894. Under this controlling standard, there was competent and substantial evidence to support the Commission's decision that Aztar substantially and persuasively established the true value in money of its real and personal property.

Responding to the Argument set forth under Assessor's Point Relied On No. IV

III. THE STATE TAX COMMISSION PROPERLY SET ASIDE THE DECISION OF THE PEMISCOT COUNTY BOARD OF EQUALIZATION BECAUSE AZTAR'S REAL PROPERTY WAS VALUED IN THE SAME MANNER AS ANY OTHER COMMERCIAL REAL PROPERTY, BASED ON ITS TRUE VALUE IN MONEY, IN THAT NO SUBCLASS WAS CREATED IN VIOLATION OF ARTICLE X, SECTION 4(B) OF THE MISSOURI CONSTITUTION.

As previously discussed, RSMo. § 137.115 requires that real property be assessed for tax purposes based on its true value in money, which is defined in terms of value in exchange. Equitable Life Assurance Soc'y, 852 S.W.2d at 380. Value in exchange is the method of valuation that Aztar used in this case, and which was found by the Commission to be the proper method of valuation for the subject real property, as it is for all commercial real estate. LF 261, 270. The Commission stressed that its decision did not attempt to establish a strict valuation methodology applicable only to casino property. LF 270. Rather, the Commission simply applied the value in exchange standard, valuing the real property based upon the highest and best legally available use. LF 269-70. The Commission recognized that use of the property as a casino, which provides the current highest financial return, does not have a market because the critical element necessary to operate a casino - the casino license - cannot be sold. LF 269-70.

Assessor's argument that not valuing the property in use as a gaming facility treats casino property differently from other types of commercial property, resulting in the creation of an unconstitutional subclass of real property, is merely a recasting of her

value in use position. The Commission properly rejected Assessor's in use valuation concept. The Commission correctly found that Assessor's in use valuation concept was improper because, among other defects, it necessarily includes various additional costs that must be extrapolated, the most significant of which is the intangible value of the license to operate a casino, which cannot be sold. LF 269-70.

It is entirely appropriate to consider such factors in determining the true value in money of property for tax assessment purposes, and no impermissible subclass is created just because certain factors may be unique to the specific property being assessed that are not applicable to other types of property in the same class. See Missouri Baptist Children's Home, 867 S.W.2d at 513 ("Merely because a factor exists which impacts on the value of one piece of property that does not affect every other piece of property in the same class is not a basis for violation of the uniformity clause"); O'Flaherty, 698 S.W.2d at 3 (factors such as supply and demand can be taken into account when ascertaining the true value in money of property without violating Art. X, § 4(a)); C&D Inv., 624 S.W.2d at 838 ("equalization factor" applied to new or reassessed residential construction and not applied to old residential construction or land held not to create a subclass in violation of Art. X, § 4(b) because the purpose of the factor had been to equalize the taxes between new construction and old construction which had not been reassessed); Stephen and Stephen Properties, 499 S.W.2d at 802-803 (special use permits limiting value of property must be considered in arriving at property's true value in money); Cupples Hesse, 329 S.W.2d at 699 ("difference in the methods or yardsticks or formulas used in ascertaining and determining actual or market value does not prove lack of uniformity if

there is a reasonable, practical and just basis for the application of different methods or formulas”); Equitable Life Assurance Soc’y, 852 S.W.2d at 381 (value of hotel franchise and income derived therefrom properly excluded from assessment of hotel’s real property); NCR Corp. v. State Tax Comm’n of Missouri, 637 S.W.2d 44, 50 (Mo. App. W.D. 1982) (use of gross rent multiplier to determine value of leased business machines did not create an unconstitutional subclass of property, a property’s legal and contractual situation may impact its true value in money).

Thus, the application of RSMo. §137.115 in such a manner as to account for market limitations on the value of different properties within a subclass does not violate Art. X, § 4(b) . The Commission appropriately applied RSMo. §137.115.1 to recognize factors relevant to the fair market value of Aztar’s property. The Commission’s valuation does not violate Art. X, § 4(b) .

The Commission did not treat Aztar’s real property differently from other commercial real property. The Commission valued the real property in the same manner as any other commercial real property - based on its value in exchange. Therefore, no subclass was created by the Commission in violation of Art. X, §4(b) of the Missouri Constitution.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court affirming the decision of the State Tax Commission should be affirmed.

Respectfully submitted,

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CERTIFICATION

1. Respondents' Substitute Brief complies with the requirements of Rule 84.06.
2. Enclosed herewith is an electronic copy of Respondents' Substitute Brief on a computer disc which has been scanned and is certified to be free of viruses.
3. Respondents' Substitute Brief, exclusive of the cover, certificate of service, signature block, appendix and this certificate, contains 12,317 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of October 2004, two true and correct copies of the foregoing were mailed first-class, postage prepaid, to:

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